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No. 122

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

R. P. ANDERSON, ET AL., PETITIONERS,

v.

BRIGADIER GENERAL L. E. SEEMAN, DIVISION ENGINEER, SOUTHWEST DIVISION, CORPS OF ENGINEERS, UNITED STATES ARMY, ET AL., RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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1. Petitioners' contentions have been misunderstood.

Petitioners do not seek judicial review of a determination by Congress of the *dimensions* of a flood control or navigation dam to be constructed at McGee Bend. They seek to prevent the inclusion of a *power segment* in such a dam because that power seg-

ment will *not* contribute to flood control benefits, will *not* contribute to navigation benefits, *and* will *not* contribute toward defraying the cost of the project as a whole. If Senate Document 98 supported the addition of power *on any of these three grounds* plaintiffs' point would be foreclosed. In that event the courts "should respect that decision" of Congress, supported by the Engineers' report, since it would *not* "involve an impossibility." But Senate Document 98 furnishes *no* such foundation for the decision to add the power segment.

And petitioners' pleadings, which for present purposes must be taken as true, assert that there is *no* basis in fact for a finding by Congress, or anyone, that the power segment performs any of the three crucial functions.

This does not lead to a substitution of a *judicial* decision for a *congressional* one as to the dimensions of a dam constructed in the interest of flood control or navigation. Petitioners seek no such obtrusion. They seek only an opportunity to prove what they have alleged; i. e., that Congress has authorized what is in part a power dam, when the power segment of it serves no constitutional purpose. The only question of law here presented is whether production of power at a loss by the addition of a segment—at top or bottom, or in the middle—which does not aid either flood control or navigation, is constitutional. Petitioners assert that it is not. *Oklahoma v. Atkinson*, 313 U. S. 508 is not *contra*.

The *fact* question of whether Congress could *possibly* conclude that the power segment would benefit flood control or navigation, or contribute toward re-

covering the cost of the project as a whole, must await trial. No such fact issue was tendered in *Oklahoma v. Atkinson.*

2. Respondents' contention (in this case and in the companion NRCD case) that dismissal should be affirmed because these are suits against the United States, and because the Secretary of the Army is an indispensable party have been properly disposed of by the Court of Appeals. Opinion of Court, Appendix B to Petition, pages A16-A17. 252 F. 2d at 322-323.

Respectfully submitted,

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